

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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LAWRENCE I. FRIEDMANN, :  
 : 12-CV-01307 (LDW)  
Plaintiff, :  
 :  
v. : 100 Federal Plaza  
 : Central Islip, New York  
RAYMOUR FURNITURE CO., INC., *et al.*, :  
 : February 26, 2013  
Defendants. :  
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TRANSCRIPT OF CIVIL CAUSE FOR STATUS CONFERENCE  
BEFORE THE HONORABLE A. KATHLEEN TOMLINSON  
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

For the Plaintiff: PETER JOHN ANDREWS, ESQ.  
The Law Offices of Peter J.  
Andrews, P.C.  
345 East 52nd Street  
Suite 2E  
New York, New York 10022

For the Defendants: JESSICA AMY CHICLACOS, ESQ.  
Nixon Peabody, LLP  
50 Jericho Quadrangle, Suite 300  
Jericho, New York 11753

Court Transcriber: RUTH ANN HAGER, C.E.T.\*\*D-641  
TypeWrite Word Processing Service  
211 N Milton Road  
Saratoga Springs, New York 12866

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1 (Proceedings began at 10:49 a.m.)

2 THE CLERK: Calling civil case 12-01307, Friedman v.  
3 Raymour Furniture Company, Incorporated, et al.

4 Please state your appearance for the record.

5 MR. ANDREWS: Peter Andrews for plaintiff Lawrence  
6 Friedmann.

7 MS. CHICLACOS: Jessica Chiclacos, Nixon Peabody for  
8 defendant.

9 THE COURT: Good morning to both of you.

10 MS. CHICLACOS: Good morning, Your Honor.

11 MR. ANDREWS: Good morning.

12 THE COURT: Mr. Andrews, I thought that Kimberly  
13 Thomsen was handling this matter at this point.

14 MR. ANDREWS: Ms. Thomsen is no longer with The  
15 Harman Firm and I am handling the matter.

16 THE COURT: Excuse me.

17 MR. ANDREWS: And I am handling the matter.

18 THE COURT: Okay. All right. Well, I have this  
19 motion to compel, so let's get to it.

20 MR. ANDREWS: Yes, Your Honor.

21 THE COURT: No, no. I'll [indiscernible] lawyers.

22 MR. ANDREWS: Okay. Very well, Your Honor. Thank  
23 you.

24 THE COURT: By the way, I'm not sure if you're aware  
25 of this, but the [indiscernible - Judge's mic not functional]

1 on [indiscernible], which is the motion has [indiscernible]  
2 and grey background. I don't know if you noticed that.

3 MR. ANDREWS: Yeah, I did notice that, Your Honor.  
4 That was an error that was not caught by our office and I --  
5 we've changed our policy. We're not using draft watermarks  
6 any longer.

7 THE COURT: Okay. All right. Well, let's go to the  
8 enumerated issues that we have here. It says complete  
9 personnel file of plaintiff's former supervisor, Ms. Goldstein  
10 [Ph.]. Mr. Chiclacos, can you tell me what the  
11 [indiscernible]?

12 MS. CHICLACOS: Sure, Your Honor. We turned over  
13 Ms. Goldstein's entire personnel file.

14 THE COURT: What was in that?

15 MS. CHICLACOS: Payroll information, new hire stuff,  
16 emails regarding she's on -- she's currently on a medical  
17 leave of absence. There were some emails about that.  
18 Everything that was contained in her personnel file was turned  
19 over.

20 THE COURT: All right. But there are typically  
21 performance reviews in those personnel files?

22 MS. CHICLACOS: Not typically with Raymour and  
23 Flanagan. Sometimes there are, sometimes there aren't. There  
24 were not any with respect to Ms. Goldstein. She was the  
25 manager.

1           With respect to Mr. Friedman, there were and those  
2           were obviously turned over.

3           THE COURT: Okay. All right. And with regard to  
4           any other complaints that were made about Ms. Goldstein would  
5           they have been kept in the personnel file or would they have  
6           been kept elsewhere?

7           MS. CHICLACOS: They would have been kept in her  
8           personnel file. There were no complaints made against her.

9           THE COURT: All right. Now, you want me to require  
10          the defendants to produce a sworn verification supporting that  
11          position. What does that mean, Mr. Andrews?

12          MR. ANDREWS: Well, we want the defendants to be  
13          precluded from offering any testimony that would otherwise  
14          have been in the personnel file that has not already been  
15          disclosed.

16          THE COURT: All right. Well, that's fine. I'm not  
17          going to require them to do that. I have counsel's  
18          representation on the record now and counsel is on notice that  
19          anything not provided in discovery which precluded the trial  
20          notices. All right.

21          Number two. Disclose [indiscernible] each and every  
22          employee who's worked with the defendant since 2005 until the  
23          time plaintiff was terminated including Asian [indiscernible],  
24          Inc., and reported reason for termination for those  
25          terminations that occurred in New York City [indiscernible]

1 following New York counties: Westchester, Nassau and Suffolk.

2 First of all, this is [indiscernible]. I'm not  
3 going to require the defendants to [indiscernible] because I  
4 don't [indiscernible].

5 With regard to any of the offices up in the Nassau  
6 and Suffolk County which was going to be restricted to anyone  
7 who was terminated -- I don't mean anybody who left  
8 voluntarily, resigned from working on the job -- anybody who  
9 was terminated by the company following January 2005 until the  
10 time the plaintiff was terminated. I will require the  
11 defendants to provide the names of those individuals, their  
12 age, and their reason for termination given by the company.  
13 All that is subject to confidentiality or which I assume were  
14 replaced on that, correct?

15 MS. CHICLACOS: Yes, Your Honor.

16 MR. ANDREWS: Yes.

17 THE COURT: All right.

18 MS. CHICLACOS: Your Honor, are you going to get the  
19 time frames at the end or --

20 THE COURT: What's that?

21 MS. CHICLACOS: Time frames for production or do you  
22 want to get to that --

23 THE COURT: Yes. [Indiscernible] --

24 MS. CHICLACOS: Right.

25 THE COURT: All right. Okay. Production of all

1 communications, all documents and all [indiscernible]  
2 memorializing information concerning any lawsuit filed in New  
3 York state by the defendant [indiscernible] this action that  
4 proves allegations that age discrimination or disability  
5 discrimination including her [indiscernible] complaints  
6 against [indiscernible] judgments entered in all such suits  
7 unless covered by attorney/client privilege. Certainly I'm  
8 not going to require the defense to [indiscernible]. That's  
9 inappropriate.

10 As to the plaintiff that filed all [indiscernible]  
11 of those two rejected categories, age or disability, to the  
12 extent that there are complaints that either court or agency  
13 [indiscernible] I will require you to turn over the pleadings  
14 in those matters. All right.

15 MS. CHICLACOS: For all of Raymour and Flanagan,  
16 Your Honor?

17 THE COURT: Well, this is New York state, so for  
18 purposes of this -- yeah, I know you have -- how many stores?  
19 I can't imagine --

20 MS. CHICLACOS: About 50.

21 THE COURT: Yeah, but I mean, how many actual  
22 complaints of age or disability discrimination could you  
23 possibly have had in the past five years?

24 MS. CHICLACOS: I mean, there are none arising from  
25 the showroom Mr. Friedman worked at.

1 THE COURT: Right. And I saw the case you cited,  
2 which also is not quite right in terms of their submission  
3 [indiscernible] case. The case didn't say to the individual;  
4 it said to the department in which the person worked. So  
5 Mr. Friedman occupied what position, salesperson?

6 MS. CHICLACOS: He was a sales associate.

7 THE COURT: He was a sales associate. Okay. So  
8 with regard to [indiscernible] reasonable parameters amongst  
9 this request anybody can work in a sales capacity who was let  
10 go -- I should say not was let go -- who raised an issue of  
11 age or disability discrimination. And I don't mean sales  
12 associates -- I mean, anybody who worked in sales in the  
13 company, all right?

14 MS. CHICLACOS: Um-hum.

15 THE COURT: That's the one age.

16 MS. CHICLACOS: For five years in New York state.

17 THE COURT: Yes.

18 MS. CHICLACOS: Okay.

19 THE COURT: Again, I'll direct you to produce the  
20 pleadings whether they're agency proceeding documents or  
21 documents about the court. I'm not asking you or requiring  
22 you to produce all communications, all documents, and all  
23 [indiscernible] information, all right. That's over broad.

24 Number four. I'm assuming this means you're looking  
25 for -- maybe I shouldn't have said anything, Mr. Andrews. I'm

1 not quite sure what this means. Are you looking for any  
2 documents they filed in EEOC? What does this actually mean?

3 MR. ANDREWS: We're looking for filings with  
4 agencies such as the EEOC as well as internal complaints.  
5 Let -- I'm sorry. Let me just limit myself --

6 THE COURT: So this only has to do with your client  
7 so --

8 MR. ANDREWS: That's correct.

9 THE COURT: Go ahead.

10 MR. ANDREWS: That's correct. We're looking for  
11 complaints filed with regulatory bodies, such as the EEOC  
12 alleging age or disability discrimination.

13 THE COURT: All right.

14 MR. ANDREWS: Regarding our client.

15 THE COURT: So your client -- how many complaints  
16 did your client file?

17 MR. ANDREWS: I believe he's filed one complaint  
18 with the EEOC.

19 THE COURT: That's it.

20 MR. ANDREWS: That's correct, Your Honor.

21 THE COURT: Okay. So essentially what you're  
22 looking for is what response did defendants made to that  
23 agency determination -- or agency filing.

24 MR. ANDREWS: That's correct, Your Honor.

25 THE COURT: All right. Do you know whether or not



1 your client [indiscernible] responded to that?

2 MS. CHICLACOS: They did not, Your Honor. The EEOC  
3 issued a right to sue before they did that.

4 THE COURT: Okay. All right. And I think I'm  
5 satisfied with that answer. Mr. Andrews, you can do whatever  
6 every other plaintiff in these cases does and that's file a  
7 Freedom of Information Act request to get an EEOC filing.

8 And reply with any and all individuals who will  
9 offer testimony are you [indiscernible] legitimate and non-  
10 discriminatory [indiscernible] termination. I'm trying to ask  
11 what the issue is here. I'll hear from defendant's counsel.

12 MS. CHICLACOS: Your Honor, I'm not quite sure what  
13 the issue is here. Defendant provided our initial disclosures  
14 back in July listing all individuals who might have knowledge  
15 or information relating to the claims in this action and its  
16 defenses. We provided interrogatory responses which listed  
17 specific individuals, so I'm not quite sure what the plaintiff  
18 is looking for here.

19 THE COURT: Go ahead.

20 MR. ANDREWS: Thank you, Your Honor. Well, this  
21 very much ties into our dissatisfaction with a recent 30(b)(6)  
22 deposition that I took where defendants offered as the  
23 30(b)(6) deponent a human resources professional, Ms. Patricia  
24 Delgennio [Ph.]. Ms. Delgennio testified at her deposition  
25 that she had not seen the notice of deposition. She had not

1 seen the complaint. She had not seen the answer or the  
2 affirmative defenses. She had not seen any pleadings in the  
3 case. I went through each one of the individual affirmative  
4 defenses. She was not familiar with any one of them. She is  
5 not personally familiar or did not have, I should say,  
6 firsthand knowledge of the termination of Mr. Friedman,  
7 testified that she had not read the performance improvement  
8 plans generated for Mr. Friedman. And when I tried to expand  
9 beyond that to other similar claims of agent disability-  
10 related discrimination, Ms. Chiclacos objected as that being  
11 beyond the scale of the deposition and shut him down.

12 THE COURT: All right. You have your Rule 30(b)(6)  
13 notice to appear with you?

14 MR. ANDREWS: I have the whole transcript. Let me  
15 see if I can --

16 THE COURT: I just want notes.

17 MR. ANDREWS: I understand. Yes. Yes, I do.

18 THE COURT: Let me take a look at that and  
19 [indiscernible].

20 MR. ANDREWS: Thank you.

21 [Pause in the proceedings.]

22 THE COURT: All right. So I see the first --  
23 they'll all here -- categories here in the 30(b)(6) notice.  
24 First one says [indiscernible] information related to anti-  
25 discrimination policies, [indiscernible], which I assume this

1 witness was certainly capable of and responded to, correct?

2 MR. ANDREWS: We were not satisfied with the  
3 responses as applied to Mr. Friedman. She had no knowledge of  
4 the policies as applied to Mr. Friedman.

5 THE COURT: Well, that's not what this asks for.  
6 This says knowledgeable policies. So you got what you asked  
7 for. You didn't put [indiscernible] Mr. Friedman.

8 MR. ANDREWS: That's correct, Your Honor.

9 THE COURT: To this category. All right. Then it  
10 says [indiscernible] -- first, when did this deposition take  
11 place?

12 MR. ANDREWS: This deposition took place fairly  
13 recently, February 13th.

14 THE COURT: Okay. Then you have here all  
15 information related to disabilities and combination of  
16 disabilities in the workplace at Raymour Furniture which,  
17 again, is a general category which I assume as the HR person  
18 who came to this she answered, yes?

19 MR. ANDREWS: Not to our satisfaction.

20 THE COURT: [Indiscernible] I assume she answered,  
21 which you're unhappy about that if she didn't answer  
22 specifically to your client, correct?

23 MR. ANDREWS: Yes. And in addition when I asked --  
24 when I tried to go beyond that to ask about other individuals  
25 where such policies were applied, she did not -- she was not

1 permitted to answer those questions.

2 THE COURT: Well, because that's not what this asks  
3 for. Okay.

4 MR. ANDREWS: Okay, Your Honor.

5 THE COURT: There's a reason why 30(b)(6) notices  
6 are usually a lot longer than this and more detailed than  
7 this. The one I do have [indiscernible] last one, all  
8 affirmative defenses asserted by the defendants and/or to be  
9 relied upon in any pleading up to and including trial. Then  
10 let me just ask Ms. Chiclacos.

11 Was this [indiscernible] supposed to be responding  
12 to that category?

13 MS. CHICLACOS: And she was prepared for that  
14 category, Your Honor. For example, our answer included  
15 affirmative defenses such as the legitimate reason for  
16 plaintiff's termination that he availed to comply -- availed  
17 himself of Raymour and Flanagan's policies. Because of this  
18 last catch-all, I allowed Mr. Andrews to question the witness  
19 all morning on information relating to Mr. Friedman, which she  
20 did answer all the questions. Just because she wasn't able to  
21 say, I've never seen the affirmative defense of laches or  
22 unclean hands before doesn't mean she was able to answer the  
23 question.

24 Your Honor might remember that we had to call you  
25 during this deposition for a ruling and you told Mr. Andrews

1 that if he was dissatisfied with her ability to answer  
2 questions on the affirmative defenses that he should go  
3 through each one, ask her specific questions. He did not do  
4 so and just ended the deposition. He merely put the answer in  
5 front of her and said, "Have you ever seen this as worded  
6 before?" I -- she was prepared to answer factual questions  
7 about the affirmative defenses, which she did.

8 MR. ANDREWS: Your Honor, one of the first things I  
9 did was ask her about -- asked the witness about each one of  
10 the affirmative defenses. The witness, as Ms. Chiclacos  
11 explained to you, testified that she had not seen and was not  
12 familiar with any one of the affirmative defenses asserted in  
13 the affirmative -- in the answer in the affirmative defenses.

14 THE COURT: Well, she didn't -- hadn't seen the  
15 document. She told you that.

16 MR. ANDREWS: That's correct. That's correct. And  
17 we got --

18 THE COURT: Rather than [indiscernible] sentence  
19 here --

20 MR. ANDREWS: I --

21 THE COURT: -- did you ask her about the substance  
22 of the affirmative defense?

23 MR. ANDREWS: Yes, I did, Your Honor. I --

24 THE COURT: Give me an example.

25 MR. ANDREWS: I asked the witness if she had any

1 information -- any firsthand information about the  
2 circumstances leading up to his termination. She implied --  
3 I'm sorry -- she answered that she had not. She answered that  
4 she had not even read any of the documents leading up to his  
5 termination.

6 THE COURT: It doesn't matter for purposes of the  
7 30(b)(6) witness. They don't have to have firsthand  
8 information in anything. They are there as the corporate  
9 representative. They're prepared by counsel. They can  
10 [indiscernible] as to what the company's position is. So  
11 unless she had any personal knowledge here or not is  
12 irrelevant to the 30(b)(6) notice.

13 MR. ANDREWS: Yes, Your Honor. I under --

14 THE COURT: Did you go beyond that?

15 MR. ANDREWS: Yes, I did, Your Honor. I asked the  
16 witness how she prepared to -- for her deposition. The  
17 witness testified that she spent an hour the day before the  
18 deposition reading only one document, the employee manual.  
19 She testified that she was not familiar with the defense of  
20 the claim and she had no factual knowledge regarding the  
21 circumstances of his termination. And I'm not only talking  
22 about firsthand direct involvement. I can't -- it's difficult  
23 for me to articulate. She just did not have knowledge  
24 regarding Mr. Friedman's termination and the circumstances of  
25 it. She did not have knowledge regarding the claims of age

1 and disability discrimination that were asserted by  
2 Mr. Friedman.

3 THE COURT: And [indiscernible] ruling and I told  
4 you to go through each of the [indiscernible] with her and it  
5 sounds like you didn't do that.

6 MR. ANDREWS: I continued to question her about her  
7 knowledge and I had previously asked her about every single  
8 one of the affirmative defenses. I really didn't know what  
9 else to do after that point.

10 THE COURT: All right. So what is it you expect the  
11 Court to direct the defendants to do?

12 MR. ANDREWS: I -- well, I have one specific idea.  
13 Ms. Delgennio, the 30(b)(6) designee testified that there was  
14 an HR person who reported to her -- I forget her name but it's  
15 in the deposition -- who appears from her testimony to have  
16 been more directly involved in the termination of  
17 Mr. Friedman. I --

18 THE COURT: So she's a fact witness, not a 30(b)(6)  
19 witness, correct?

20 MR. ANDREWS: I believe that she is -- she would  
21 have been the most appropriate 30(b)(6) witness.

22 THE COURT: [Indiscernible] here, Mr. Andrews. The  
23 point of 30(b)(6) I just said a few minutes ago is to hear the  
24 company's position with regard to each of those elements. You  
25 had an opportunity to sit there and go through, as I directed

1 you to do or suggested that you do, go through each  
2 affirmative defenses with her and find out what the company's  
3 position was with respect to each of those affirmative  
4 defenses. You didn't do that.

5 MR. ANDREWS: I think I did, Your Honor.

6 THE COURT: Well, fine. Then you got what you got,  
7 all right?

8 MR. ANDREWS: Okay.

9 THE COURT: [Indiscernible] somebody else out there  
10 that has factual information and personal firsthand  
11 information then that's fact witness. That's somebody else  
12 you could have called.

13 MR. ANDREWS: I understand your point perfectly,  
14 Your Honor. I respectfully submit that the corporation does  
15 have an obligation to designate an appropriate 30(b)(6)  
16 witness, not simply any witness who can be labeled a 30(b)(6)  
17 witness.

18 THE COURT: I understand that. And, again, that  
19 doesn't mean that they're required to designate somebody with  
20 "personal knowledge" of these events here. They designated a  
21 corporate representative whom they say they prepared to  
22 provide answers, especially these types of answers, with  
23 regard to the affirmative defenses. They've prepared this  
24 person to do that and you're telling me you're not happy with  
25 the answers that you got.



1 MR. ANDREWS: That's what I'm saying. Yes, Your  
2 Honor.

3 THE COURT: Okay. Well, I think you're stuck with  
4 what you have.

5 MR. ANDREWS: Okay, Your Honor.

6 THE COURT: Mr. Andrews, all right?

7 MR. ANDREWS: Okay.

8 THE COURT: I know that -- I'm still on number five.  
9 I know, Ms. Chiclacos, that you indicated you gave names of  
10 witnesses and what information or ultimate basis of knowledge  
11 of each of those folks in your original six disclosures,  
12 correct?

13 MS. CHICLACOS: Yes.

14 THE COURT: All right. And just out of curiosity  
15 was this other HR person who's being referred to here listed  
16 there?

17 MS. CHICLACOS: Yes, Your Honor.

18 THE COURT: Okay. All right. The request here is  
19 just slight different and I suppose really the only question  
20 here is, is somebody going to be presented for the defense  
21 side to specifically testify about those affirmative defenses  
22 at trial. Does anybody here have anyone more you want to  
23 present?

24 MS. CHICLACOS: In our original disclosures?

25 THE COURT: Yes.

1 MS. CHICLACOS: No, Your Honor.

2 THE COURT: Is there's somebody different or in  
3 addition to 30(b)(6) witnesses you presented?

4 MS. CHICLACOS: No, Your Honor.

5 THE COURT: Okay. All right. Number six, the  
6 identities of any and all individuals named in defendant's  
7 initial disclosures, document requests or [indiscernible] who  
8 have knowledge of any affirmative defenses including  
9 affirmative defenses in this action. What does that mean? If  
10 there -- want their identity. Aren't they named in the  
11 Rule 26 disclosures?

12 MR. ANDREWS: Yes, Your Honor. This goes back to  
13 what you -- the previous point, knowledge of affirmative  
14 defenses and whether any of these individuals will be  
15 testifying about those affirmative defenses at trial. We  
16 accept --

17 THE COURT: Then you just got your answers.

18 MR. ANDREWS: We accept that answer. We understand  
19 that answer.

20 THE COURT: Number seven, all emails concerning  
21 plaintiff including [indiscernible] with any [indiscernible]  
22 last name or alluded thereto or any [indiscernible] subject  
23 line, to, from or line copy fields of any email. First of  
24 all, were these things requested in your document requests?

25 MR. ANDREWS: I believe they were, Your Honor. I

1 can look.

2 THE COURT: First of all, I don't understand why you  
3 wouldn't have further discussion with counsel. First of all,  
4 this is way too broad. The [indiscernible] got this is not  
5 always so lucky with plaintiff's name but had some search  
6 terms to limit the scope of the production, otherwise -- I  
7 mean, how many years did she work there? Having an email that  
8 was sent has absolutely nothing to do with this case and I  
9 don't require them to produce that. So, you know, what did  
10 you want to do about ESI early on in this case? We've had a  
11 discussion about this, you know, multiple conferences ago.

12 MR. ANDREWS: We have had a number of cordial and  
13 productive discussions with Ms. Chiclacos where we've tried to  
14 narrow the scope of most of the requests.

15 THE COURT: But do you understand --

16 MS. CHICLACOS: Your Honor --

17 THE COURT: -- I'm not requiring the defendants to  
18 produce every email in their possession that mentions her  
19 name?

20 MS. CHICLACOS: Your Honor, if I may.

21 THE COURT: Go ahead.

22 MS. CHICLACOS: We agreed to produce ESI in hard  
23 copy format because we knew that this would not be an  
24 intensive ESI case. This was a sales associate who didn't use  
25 email. We produced all emails in hard copy format. There

1 weren't that many.

2 THE COURT: Okay. The production that you made, was  
3 it in conjunction with the breadth of this request?

4 MS. CHICLACOS: Yes, this was in our -- we  
5 supplemented our production from Ms. Goldstein but in our  
6 major production to his document requests emails were  
7 contained.

8 THE COURT: Okay.

9 MS. CHICLACOS: In hard copy format per our  
10 agreement.

11 THE COURT: All right. Then did you as counsel  
12 oversee and give instructions as to how this was to be done to  
13 your client?

14 MS. CHICLACOS: In conjunction with my client, yes.

15 THE COURT: Yes.

16 MS. CHICLACOS: Yes.

17 THE COURT: All right. So what is it you claim they  
18 haven't given you?

19 MR. ANDREWS: We didn't see any hard copies of the  
20 emails that there appear to have been breaks in the dates.  
21 They did not seem to be complete chains. We just wanted  
22 reassurance that those were the complete chains of emails  
23 and --

24 THE COURT: Do you know if that's the case or not?

25 MS. CHICLACOS: Your Honor, I believe he's referring

1 to -- and this goes to categories eight and nine. They're  
2 specifically referring to an email that I believe is from 2005  
3 when he first started working for the company. That wasn't  
4 even contained on the server. It was printed and kept in his  
5 personnel file. That had something to do with his changing  
6 his payroll status when he transferred to another location.  
7 Everything that we have that -- in their full format has been  
8 produced.

9 THE COURT: [Indiscernible]

10 MR. ANDREWS: We -- I mean, if that's counsel's  
11 representation we recognize it.

12 THE COURT: All right. What about number nine,  
13 [indiscernible] reaction? Do you know what this is referring  
14 to, Ms. Chiclacos?

15 MS. CHICLACOS: No, I don't. I need Mr. Andrews to  
16 explain this.

17 THE COURT: Okay. It looks like whatever this  
18 particular document is, 0019, has been redacted in some  
19 fashion.

20 MS. CHICLACOS: I believe, Your Honor, that this is  
21 the -- this is one of these emails that was printed out from a  
22 long time ago that someone -- my assumption is highlighted  
23 over a small portion of it that's completely irrelevant to the  
24 email and that's what they're looking for.

25 MR. ANDREWS: We accept that response. We would

1 like a privilege log for that document.

2 THE COURT: You know, if you have the original of  
3 that document send to me for in camera review. We also have  
4 [indiscernible], all right.

5 MS. CHICLACOS: Okay. If we do, Your Honor, like I  
6 said this was an old email that was printed off with the file.  
7 I believe this is the only copy, but I will certainly double-  
8 check.

9 THE COURT: All right. Number ten, production of  
10 all electronic messages and emails of Ms. Goldstein's that are  
11 responsive to plaintiff's document requests.

12 MS. CHICLACOS: If I may, Your Honor.

13 THE COURT: Go ahead.

14 MS. CHICLACOS: Ms. Goldstein, who I'm sure we'll  
15 get to some issues with her in a moment --

16 THE COURT: Yes.

17 MS. CHICLACOS: -- is a current Raymour and Flanagan  
18 employee residing in Florida on medical leave of absence. We  
19 deposed her. Walker Harman deposed her on Friday in Florida.  
20 She testified during deposition that she personally had no  
21 emails, no text messages, no documents in her possession  
22 relating to Mr. Friedman.

23 Ms. Goldstein went out on leave months before we  
24 first got a demand letter from The Harman Firm relating to  
25 Mr. Friedman, so she was gone, so she had no access to email,

1 no access to Raymour and Flanagan's files.

2 THE COURT: Meaning she couldn't doctor it then if  
3 she wanted to.

4 MS. CHICLACOS: Absolutely had no access to  
5 anything. So obviously within our course of responding to the  
6 discovery requests Ms. Goldstein testified she kept a  
7 personnel file in the Garden City showroom that was produced,  
8 so Raymour and Flanagan obviously undertook a search of her  
9 records to see if there were any responsive documents.

10 THE COURT: All right. Did she -- let me ask  
11 [indiscernible] to her. With regard to her computer that she  
12 used when she was in Garden City, is it?

13 MS. CHICLACOS: Yes.

14 THE COURT: All right. Was a search done of her  
15 computer files in terms of her own email [indiscernible] if  
16 Mr. Goldstein [indiscernible]?

17 MS. CHICLACOS: I believe so and she -- like I said  
18 earlier, this was not a situation where these -- she was a  
19 manager of about 35 sales associates. She didn't use email  
20 and she testified she couldn't even recollect any emails  
21 relating to Mr. Friedman.

22 THE COURT: Okay. One thing I will ask you to do  
23 just to put this to bed --

24 MS. CHICLACOS: Yeah.

25 THE COURT: -- is to get the declaration from

1 somebody in regards to the office who can confirm that her  
2 computer that she used was searched for any emails regarding  
3 Mr. Friedman.

4 MS. CHICLACOS: Your Honor, certainly. There might  
5 be -- okay, sure.

6 THE COURT: All right. And if they found or find  
7 anything turn them over. If they don't, we'll have a  
8 declaration to be is set forth [indiscernible] search and will  
9 be found.

10 MS. CHICLACOS: Okay.

11 THE COURT: Okay. All right. This number 11,  
12 footnote says that [indiscernible] produce this information  
13 forthwith. What is this? This business plan, \$750,000.00  
14 business plan.

15 MR. ANDREWS: Your Honor, plaintiffs are not quite  
16 sure what it is, which is why we're asking for full  
17 disclosure. It appears to be some sort of sales tool that was  
18 used to determine the plan for Mr. Friedman. Sales objectives  
19 for Mr. Friedman.

20 THE COURT: Do you know what this is?

21 MS. CHICLACOS: I'm not sure. There was not a  
22 specific plan made for each associate. There is a general  
23 plan that applied to all associates within the Garden City  
24 showroom that had to meet a minimum of \$750,000.00 per year.  
25 That's what --



1 THE COURT: [Indiscernible] turn over to --

2 MS. CHICLACOS: It contained other documents, yes.

3 THE COURT: Okay. All right. Well, I'll leave you  
4 to talk about that if necessary. It sounds to me if based on  
5 the fact that there's no second document [indiscernible]  
6 plaintiff that should be resolved.

7 This number 12, sworn verification. The defendant  
8 [indiscernible] defense attorney in their '03 evaluations  
9 [indiscernible] by defendant and that the defendant has no  
10 means of better dating those and [indiscernible] without a  
11 date of issue.

12 First of all, did your client get copies of his  
13 performance reviews?

14 MR. ANDREWS: We got copies of three performance --

15 THE COURT: No, no. You're not answering.

16 MR. ANDREWS: I'm sorry. Yes, Your Honor.

17 THE COURT: Does your client -- did your client get  
18 copies of them when they were being done?

19 MR. ANDREWS: Yes, Your Honor.

20 THE COURT: Okay. So you have them.

21 MS. CHICLACOS: No.

22 THE COURT: Hang on. Do you or don't you?

23 MR. ANDREWS: To the extent that Mr. Friedman held  
24 onto copies when they were received, we have what he has.

25 THE COURT: Okay. And what does he have?

1 MR. ANDREWS: He has them. There --

2 THE COURT: This is not [indiscernible] secrets.  
3 Whatever he has, he has. That should have been turned over to  
4 defense counsel and wasn't.

5 MR. ANDREWS: Yes, Your Honor.

6 THE COURT: Okay. So what are you talking about?

7 MR. ANDREWS: We're talking about three performance  
8 improvement plans that were prepared that were essentially  
9 disciplinary write-ups of Mr. Friedman addressing his alleged  
10 poor sales performance, two of which are undated, one of which  
11 is dated. We -- all we're doing is seeking assurance that  
12 there are no other performance assurance plans or that there  
13 isn't a better way to get a date for the two that are undated.

14 THE COURT: Yeah. What better way to get  
15 [indiscernible] from your client who actually you tell me got  
16 what he got, yes?

17 MR. ANDREWS: Mr. Friedman is not sure that he  
18 received a copy and held onto a copy of every such document.

19 THE COURT: So he doesn't know how many performance  
20 reviews he got?

21 MR. ANDREWS: Well, that's correct but this --  
22 specifically he doesn't know how many disciplinary write-ups  
23 he got if they were not always given to him. The defendants  
24 have produced these performance improvement plans and that's  
25 what we're inquiring about, whether the defendants have

1 produced the performance improvement plans and the defendants  
2 have produced. We are not --

3 THE COURT: No other confirmation that there are any  
4 others is what you're telling me.

5 MR. ANDREWS: That's correct.

6 MS. CHICLACOS: There are no others, Your Honor.

7 THE COURT: All right.

8 MS. CHICLACOS: I'd also like to note that plaintiff  
9 didn't produce any performance evaluations that he had in his  
10 possession.

11 THE COURT: Mr. Andrews.

12 MR. ANDREWS: Well, he produced whatever he had. I  
13 had -- if he kept them they were produced. I can't -- I'm not  
14 certain if he kept every single thing that was handed to him.

15 THE COURT: You just through done telling me that he  
16 has his performance reviews.

17 MR. ANDREWS: If he was handed performance reviews  
18 and kept them, we would have produced them. I --

19 THE COURT: So you can't tell me as you sit here  
20 whether or not he got them?

21 MR. ANDREWS: I believe he's testified in his  
22 deposition that he received performance reviews. I'm not  
23 certain if he retained each one of them.

24 THE COURT: And this [indiscernible] litigation you  
25 never asked him that?

1           MR. ANDREWS: I have asked him that. I have asked  
2 him that, Your Honor. And Mr. Friedman does not recall  
3 whether or not he retained each performance review that he was  
4 given.

5           THE COURT: All right. Well, you know what? You're  
6 going to go back and talk to your client. Today is Tuesday.  
7 By Friday you're going to give an answer ready to Mr.  
8 Chiclacos whether he's got any of these documents. And if he  
9 does, even if they have duplicates of this form you said you  
10 turned everything over, give her copies. I want to make sure  
11 this issue is with [indiscernible].

12           MR. ANDREWS: I will speak to him today, Your Honor.

13           THE COURT: Who actually performed the reviews  
14 [indiscernible] evaluations of these performance improvement  
15 plans for the plaintiff? Is it Ms. Goldstein or somebody  
16 else?

17           MS. CHICLACOS: Well, he worked at three stores,  
18 Your Honor.

19           THE COURT: Yeah.

20           MS. CHICLACOS: So at the time of his termination  
21 and the couple years proceeding that it was Ms. Goldstein and  
22 she testified about that on Friday.

23           THE COURT: That's what I was going to say. Was she  
24 asked about this at her deposition, Mr. Andrews?

25           MR. ANDREWS: I was not at the deposition but I

1 believe she was asked about this.

2 THE COURT: All right. What is the [indiscernible]?  
3 I mean, I realize whoever conducted the deposition  
4 [indiscernible] she was the one responsible for doing all of  
5 them. Why do I turn around and make her -- anybody else give  
6 a sworn declaration that that's all that's there? It was a  
7 perfect opportunity to explore that issue at the deposition.

8 MR. ANDREWS: We understand, Your Honor.

9 THE COURT: Okay. All right. So you had  
10 Ms. Goldstein's deposition last Friday?

11 MS. CHICLACOS: Yes, Your Honor.

12 THE COURT: Okay. And the last one here, which is  
13 14, production of a privilege log or any documents defendant  
14 has either withheld or redacted on the basis of privilege.  
15 All right. Did you withhold anything on the grounds of  
16 privilege?

17 MS. CHICLACOS: No, Your Honor.

18 THE COURT: All right. So that's I assume the  
19 reason why there's no [indiscernible] respond?

20 MS. CHICLACOS: Correct.

21 THE COURT: And the only issue with redaction I take  
22 it has to do with that [indiscernible], correct?

23 MS. CHICLACOS: Correct.

24 THE COURT: All right.

25 MS. CHICLACOS: I will look at that email and if I

1 can get an answer to Mr. Andrews, I'll explain to him whether  
2 or not there's a clean copy or not.

3 THE COURT: All right. All right. That seems to be  
4 it for the February 8th letter, so I have granted in part to  
5 the extent as set forth here this morning granting in part  
6 that motion to compel.

7 Let me go over now to -- and just in terms of what I  
8 direct you to produce in ten days, okay? Ship out is ten  
9 days.

10 MS. CHICLACOS: Okay. Your Honor, I would just like  
11 to say if you're going to now turn to the issues raised by  
12 Mr. Andrews' letter from yesterday, I --

13 THE COURT: Yeah, I [indiscernible] --

14 MS. CHICLACOS: I obviously didn't have a chance to  
15 put a response in writing, but I'm able to speak to all of  
16 them.

17 THE COURT: Well, what I was about to say is the  
18 following. My intention was to have you two take the time to  
19 talk to each other to try to resolve what's raised here  
20 because frankly I don't see any terms [indiscernible] --

21 MS. CHICLACOS: Okay.

22 THE COURT: -- to each other or not, so --

23 MS. CHICLACOS: That's fine, Your Honor.

24 THE COURT: All right. I'll give you an opportunity  
25 now. Hold on a minute.

1 All right, [indiscernible] so you can stay here in  
2 the courtroom and go through what you need to go through.

3 MR. ANDREWS: Thank you.

4 THE COURT: Whatever is unresolved I'll come out and  
5 talk to you about them when you're finished, all right? You  
6 let us know.

7 MR. ANDREWS: Okay.

8 (Off the record.)

9 THE COURT: Back on the record. So where are we?

10 MR. ANDREWS: Your Honor, Mr. Chiclacos and I have  
11 discussed the February 25th letter item by item. With respect  
12 to "i" and "ii" Ms. Chiclacos advises me that the documents  
13 that would be referred to in those categories have already  
14 been produced and we accept her response. With respect to  
15 "iii," the documentation related to the termination of the  
16 younger individual that Ms. Goldstein believes was terminated  
17 for poor performance, Ms. Chiclacos advised me that she will  
18 look to see if that information exists and that person can be  
19 identified.

20 With respect to items four, five -- I'm sorry, yes.  
21 With respect to items four and five, Ms. Chiclacos advises  
22 that they will not produce those categories of documents.

23 THE COURT: Which ones?

24 MR. ANDREWS: "iv" and "v," documentation related to  
25 the 2010 year-end sales figures for the associates as they

1 show plaintiff's allegedly unflattering figures contrasted  
2 with his former colleagues' numbers, so basically comparative  
3 performance data. And "v" is performance improvement plans  
4 for two other co-workers whom we know only as Raffael [Ph.]  
5 and Karen [Ph.]. Ms. Chiclacos advises that the defendant is  
6 not -- will not produce documents responsive to those  
7 requests.

8 THE COURT: Are they relevant to your request?

9 MR. ANDREWS: Are they relevant to us for their  
10 comparative significance, their comparative data.

11 THE COURT: Based on what? There are two points  
12 here, age discrimination and disability discrimination,  
13 correct?

14 MR. ANDREWS: That's correct, Your Honor.

15 THE COURT: All right. So how are they comparators?

16 MR. ANDREWS: We believe that there are other  
17 colleagues whose performance was at or lower than  
18 Mr. Friedman's for sales volume who were not terminated.

19 MS. CHICLACOS: Your Honor, if I may, the reason I  
20 agreed to produce documentation relating to a younger  
21 individual who was terminated was because this came out for  
22 the first time during Ms. Goldstein's deposition.

23 With respect to these remaining categories,  
24 comparative sales data, coaching improvement plans for other  
25 employees, plaintiff has had eight months to ask for this



1 information. In the complaint itself he alleges that eight  
2 other employees were put on coaching plans at the same time he  
3 was. He discusses other employees' performance. He discusses  
4 other specific employees that were allegedly not terminated.  
5 And the day discovery closes they ask for this information.  
6 And at this point, Your Honor, because this has been par for  
7 the course throughout discovery in this matter, I will not  
8 agree to it. They had ample time to do it.

9           The one thing that came out for the first time on  
10 Friday I will certainly look for, but the remainder of the  
11 information they could have asked for in their document  
12 requests.

13           THE COURT: I mean, it's something newer than --  
14 this has been an ongoing issue in this case, Mr. Andrews.  
15 There's a great lack of effort on the plaintiff's side  
16 responding to the [indiscernible] that were originally served  
17 by the defendant. There was a great lack of initiative issue  
18 in terms of the plaintiff's own house [indiscernible] order  
19 regarding discovery demands. I would understand if there were  
20 issues that came up as part of Ms. Goldstein's deposition  
21 which would be "new information." This is not new information  
22 here.

23           MR. ANDREWS: We feel that with respect to "v"  
24 Rafael and Karen these are names that were raised at the  
25 Goldstein deposition that we did not know previously.

1           THE COURT: Well, there's previous information that  
2 were any of these people involved and you did not move that  
3 information.

4           MS. CHICLACOS: And plaintiff himself testified.

5           MR. ANDREWS: I'm not certain if I have a copy of  
6 the plaintiff's document requests with me. I believe that one  
7 of the document requests did ask for this type of information,  
8 Your Honor.

9           MS. CHICLACOS: I have them, Your Honor.

10          THE COURT: All right.

11          MS. CHICLACOS: They're not contained within here.

12          THE COURT: Well, we'll look at them.

13          MR. ANDREWS: Thank you.

14          THE COURT: You know, I've made clear from day one  
15 in this case that this case was assigned to Judge Wexler and  
16 that you're not hearing all [indiscernible] these deadlines  
17 and you knew what your responsibilities were.

18                       [Pause in the proceedings.]

19          MR. ANDREWS: There are some general categories of  
20 requests. I do not see a specific request for comparative  
21 data, Your Honor.

22          THE COURT: All right. So I'm afraid you're out of  
23 luck.

24          MR. ANDREWS: I'm sorry?

25          THE COURT: You're out of luck.

1 MR. ANDREWS: Thank you, Your Honor.

2 THE COURT: All right. What about number six?

3 MR. ANDREWS: Number six, Ms. Chiclacos advises that  
4 we -- she has produced this. We accept that response.

5 Number seven, sales performance reports from 2011 of  
6 Kevin, Theresa [Ph.] and Joan. Again, these are names that  
7 came up in the Goldstein deposition for the first time.

8 THE COURT: Yeah. But it goes back to the same  
9 issue just discussed, so -- number eight.

10 MR. ANDREWS: We discussed this and I'm not really  
11 sure how to best address this. Ms. Goldstein, as you were  
12 advised by Ms. Chiclacos is out on medical leave, she  
13 testified that she herself does not possess responsive  
14 documents with her. It's clear that she did not participate  
15 herself in the search for responsive documents and that  
16 concerned us simply because we believe that she would have  
17 been a person with a high degree of knowledge as to the  
18 existence of any such responsive documents.

19 THE COURT: What was the date of defendant's  
20 representation of her had to do with anything here?

21 MR. ANDREWS: It is unclear as to when Ms. Goldstein  
22 became aware of the lawsuit and what role, if any, she played  
23 in assisting the defendants in providing discovery responses.

24 THE COURT: Why wasn't this all explored at the  
25 deposition? You had the witness right there. Had every

1 opportunity to ask her those questions.

2 MR. ANDREWS: I was not at the deposition myself,  
3 Your Honor.

4 THE COURT: That doesn't excuse it, Counsel.

5 MR. ANDREWS: Yes.

6 THE COURT: You know, you should have talked to who  
7 was at the deposition before you wrote this letter and came  
8 here today. Okay. I've already directed the defendant to go  
9 back and have somebody check the computer which Ms. Goldstein  
10 worked to go through and do a search to see whatever  
11 responsive documents may be there. If there aren't any, you  
12 have a declaration of that person as to what search was  
13 undertaken and what they found. So that's as far as you go  
14 with this.

15 MR. ANDREWS: That's --

16 THE COURT: Again --

17 MR. ANDREWS: That's satis --

18 THE COURT: -- whoever was conducting the deposition  
19 had ample opportunity to explore those areas through the  
20 deposition questioning, so I'll --

21 MS. CHICLACOS: He did, Your Honor.

22 THE COURT: Okay. What about the last one?

23 MR. ANDREWS: Your Honor, that's a catch-all  
24 category. In light of your rulings it may not be necess --

25 THE COURT: I'm denying that.

1 MR. ANDREWS: I'm sorry?

2 THE COURT: I'm denying that.

3 MR. ANDREWS: Yeah, I understand, Your Honor.

4 THE COURT: All right. All right. So you've got  
5 one category [indiscernible] check off and that's  
6 [indiscernible] if I understand [indiscernible],  
7 Ms. Chiclacos. Correct?

8 MS. CHICLACOS: That is correct, Your Honor.

9 THE COURT: All right. And same thing. Whatever  
10 you find within the ten days to --

11 MS. CHICLACOS: That's fine, Your Honor. Um-hum.

12 THE COURT: All right. Then looking at the case  
13 management order discovery ended February 25th. We'll have  
14 what you don't have we're talking about today within ten days.  
15 Mr. Andrews, the question here is whether anybody tends to  
16 move for summary judgment. Is the plaintiff intending to make  
17 a motion?

18 MR. ANDREWS: The plaintiff does not presently  
19 intend to move for summary judgment.

20 THE COURT: Does not?

21 MR. ANDREWS: No.

22 THE COURT: Okay. What about your client?

23 MS. CHICLACOS: We certainly are, Your Honor.

24 THE COURT: All right. So I don't see any reason  
25 that [indiscernible]. All this is, is a letter request to

1 Judge --

2 MS. CHICLACOS: Absolutely not. That has no bearing  
3 on that.

4 THE COURT: Okay.

5 MR. ANDREWS: I'm sorry, I didn't hear the last  
6 portion, Your Honor.

7 THE COURT: The dispositive motion process is issued  
8 by the [indiscernible] letter to Judge Wexler. And I said, I  
9 don't see any reason to rule that [indiscernible] date since  
10 it's in the letter request for the pre-motion conference.

11 MR. ANDREWS: Very good, Your Honor.

12 THE COURT: All right. Were there any experts used  
13 in this case?

14 MR. ANDREWS: There have not been yet and I for the  
15 plaintiffs don't anticipate one.

16 THE COURT: The plaintiffs do not?

17 MR. ANDREWS: No. No, Your Honor.

18 THE COURT: [indiscernible]

19 MS. CHICLACOS: No, Your Honor.

20 THE COURT: The deadline passed anyways.

21 MS. CHICLACOS: Correct.

22 THE COURT: All right. All right. Then a joint  
23 pretrial order is due on March 25th and then we'll be back  
24 here on a pretrial conference on April 2nd. So the rest of  
25 this is [indiscernible] housekeeping matters [indiscernible]

1 otherwise, we're [indiscernible]. Is there anything else you  
2 want to raise today while I have you both here on behalf of  
3 plaintiff, Mr. Andrews?

4 MR. ANDREWS: No, Your Honor.

5 THE COURT: Okay. Anything else on your side on  
6 behalf of the defendant, Ms. Chiclacos?

7 MS. CHICLACOS: No thank you, Your Honor.

8 THE COURT: All right. We'll get this into an order  
9 sometime this evening, all right?

10 MS. CHICLACOS: Thank you.

11 MR. ANDREWS: Thank you.

12 THE COURT: All right. Have a good rest of the day.

13 MR. ANDREWS: Thank you. You too, Your Honor.

14 (Proceedings concluded at 11:59 a.m.)

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1 I certify that the foregoing is a court transcript  
2 from an electronic sound recording of the proceedings in the  
3 above-entitled matter.

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6 \_\_\_\_\_  
7 Ruth Ann Hager, C.E.T.\*\*D-641

8 Dated: February 28, 2013  
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